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In The

Supreme Court of the United States

October Term, 1987

STATE OF CALIFORNIA, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF AMICUS CURIAE, FRIANT WATER USERS AUTHORITY, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

A. B. Ewell, Jr.*
Gary W. Sawyers
*Counsel of Record
A. B. Ewell, Jr., A
Professional Corporation
83 East Shaw Avenue
Suite 203
Fresno, California 93710
Telephone: (209) 225-8300

Attorneys for Amicus Curiae, Friant Water Users Authority

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, the Friant Water Users Authority, a California joint powers authority (the "Authority"), respectfully submits this brief amicus curiae in support of the petitioners, State of California, *et al.* Written consent to the filing of this brief has been granted by counsel for all parties. Copies

of all such consents have been filed with the Clerk of the Court.

The Authority was formed on October 24, 1985 pursuant to California's Joint Exercise of Powers Act (California Government Code § 6500 *et seq.*).[1] The Authority consists of 24 public districts,[2] each of which is a supplier of irrigation water received through the Friant Division of the United States Department of Interior Bureau of Reclamation's Central Valley Project (the "Central Valley Project"). The Friant Division of the Central Valley Project provides irrigation water to

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[1] Under California's Joint Exercise of Powers Act, two or more public agencies may by agreement jointly exercise any power common to those agencies for the purposes set forth in the agreement between them. When, as in the case of the Authority, the agreement between the agencies provides for the creation of an entity separate from the parties to the agreement, the resulting entity is itself a public agency separate from the parties to the agreement. See California Government Code §§ 6502, 6503, 6503.5 and 6507.

[2] The members of the Authority are the Alpaugh Irrigation District, Arvin-Edison Water Storage District, Atwell Island Water District, Chowchilla Water District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Fresno Irrigation District, International Water District, Ivanhoe Irrigation District, Kern-Tulare Water District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lower Tule River Irrigation District, Orange Cove Irrigation District, Pixley Irrigation District, Porterville Irrigation District, Rag Gulch Water District, Saucelito Irrigation District, Shafter-Wasco Irrigation District, Southern San Joaquin Municipal Utility District, Stone Corral Irrigation District, Teapot Dome Water District, Terra Bella Irrigation District and Tulare Irrigation District.

over one million acres of farmland in California's San Joaquin Valley.

The Authority was formed to provide for the joint exercise of powers common to each of the Authority's members to (i) operate and maintain dams, reservoirs, canals and facilities in order to acquire, divert, store and distribute water for beneficial use, (ii) provide information on water supplies, water distribution, and operation and maintenance problems affecting the members of the Authority, and (iii) preserve and protect the rights and benefits of the members of the Authority in and to the Central Valley Project. Consistent with its stated purposes, on August 19, 1986 the Authority entered into a contract with the United States Department of the Interior Bureau of Reclamation pursuant to which the Authority assumed responsibility for the operation and maintenance of the portion of the Central Valley Project consisting of the 151 miles of the Friant-Kern Canal.[3] As a result, the Authority is now responsible for the delivery of the waters conveyed in the Friant-Kern Canal system to all public districts utilizing that water, most of which are members of the Authority.

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[3] The Friant-Kern Canal is the larger of the two canals which deliver water stored behind Friant Dam in Fresno County. The Friant-Kern Canal, the 36 mile Madera Canal, Friant Dam and the reservoir behind Friant Dam (Millerton Lake, which has a capacity of 520,500 acre feet) constitute the principal facilities of the Friant Division of the Central Valley Project.

The rights to all waters delivered through the Central Valley Project, including those delivered by the Authority through the Friant-Kern Canal to the districts which ultimately distribute those waters to farmers, have been granted to the United States pursuant to permits to appropriate water issued by the California State Water Resources Control Board and its predecessors. *See* Decision 1485 of the California State Water Resources Control Board (August 1978), which sets forth the relevant permits held by the United States. Those permits were granted pursuant to the following Decisions of the California State Water Resources Control Board and its predecessors: Decision 1356 (February 5, 1970), Decision 1308 (July 18, 1968), Decision 1250 (June 1, 1966), Decision 1020 (June 30, 1961), Decision 990 (February 9, 1961), Permit Order 124 (September 10, 1959), Decision 935 (June 2, 1959), and Decision 893 (March 18, 1958). The United States therefore relies on appropriative rights obtained under California law through the long-standing and traditionally utilized state administered appropriation process in order to deliver water through the Central Valley Project.

As the agencies primarily responsible for the delivery of irrigation water to over one million acres of the nation's most fertile and productive farmland, the Authority and its members are vitally interested in the issues raised by this case because of the effects which the ruling of the California Supreme Court could have on their ability to obtain and distribute an adequate and reliable supply of water to lands within their service areas. Because those lands are dependent upon the

appropriated water delivered through the Central Valley Project for irrigation, the existence of "federal riparian rights" could significantly and adversely impact those lands by reducing the amount of appropriated water available for distribution and/or creating substantial uncertainty about water availability. The Authority therefore believes the opinion below poses a threat both to the water supplies on which it and its members depend, and to the viability of the farming operations which rely on deliveries of appropriated waters such as those delivered through the Central Valley Project.

SUMMARY OF ARGUMENT

By its judgment below, the California Supreme Court has abruptly recognized "federal riparian rights" as a component of California's water rights system, which has heretofore been premised (at least in part) on the absence of such rights. Through its strained and improper analysis of the relevant federal statutes, the California Supreme Court has ignored policy previously adopted by this Court and effectively superimposed a paramount federal riparian right on the existing water rights system in California. In so doing, the court below has disrupted the already delicate structure of water rights within California by suddenly recognizing riparian rights held by the federal government to virtually all waters in California's rivers and streams. This disruption is not justified by either legal analysis or policy considerations.

If not corrected by this Court, the California Supreme Court's improper decision below will adversely impact virtually all Californians. The exercise by the federal government of the enormous rights recognized by the decision below would significantly reduce the water supplies on which millions of Californians have come to rely, worsening an already critical water shortage problem affecting much of the state. Further, even the existence of those rights creates immense uncertainty with respect to California's scarce water resources, making long-range planning and management impossible. Amicus therefore urges the Court to grant the petition of the State of California for a writ of certiorari to the California Supreme Court so that this Court may have the opportunity to review and reverse the decision below.

Amicus is familiar with the petition for a writ of certiorari filed with this Court by the State of California, *et al.* and believes that the legal issues relevant to the Court's review of the petition are comprehensively and persuasively set forth therein. The Authority submits this brief amicus curiae in order to assist the Court in understanding certain policy considerations involved in this case and the potentially significant and adverse effects which the judgment below may have.

ARGUMENT

I

THE DECISION BELOW IGNORES POLICY CONSIDERATIONS PREVIOUSLY ADOPTED BY THIS COURT

In *United States v. Mexico*, 438 U.S. 696 (1978), this Court was called upon to determine the scope of the federal government's "reserved" water rights on lands reserved for national forest purposes. In determining that such reserved rights may be exercised only to further the primary purpose of a federal reservation, the Court recognized the significance of the issue before it by stating:

> "The quantification of reserved water rights for national forests is of critical importance to the West, where . . . water is scarce and where more than 50% of the available water either originates in or flows through national forests." 438 U.S. at 705.

In reaching its decision in *United States v. New Mexico*, this Court recognized that claims to water for use on federal reservations inescapably vie with other public and private claims for the limited amounts of water available in the West, and correctly adopted a policy that new federal claims to water in the arid West must be examined with great care and with a view to the potential impact of unregulated federal water rights. Now, by its decision below in the instant case, the California Supreme Court has determined that the federal government can accomplish through the exercise of a riparian right what this Court determined could not be accomplished by the federal government through the exercise of reserved rights – diversion of

water to lands reserved by the federal government (and indeed, to all federal lands) for purposes other than the primary purpose of those lands. In order to arrive at this result, the Court below has misinterpreted the applicable Constitutional provisions, as well as the relevant federal statutes (which, ironically, were enacted to further Congress' help goal of settling the West by adding stability in the area of water rights), and has completely ignored the fundamental policy considerations implicit in this Court's decision in *United States v. New Mexico*.

II

THE EXISTENCE OF A FEDERAL RIPARIAN RIGHT WILL CAUSE ENORMOUS DISRUPTION OF WATER RIGHTS AND UTILIZATION OF WATER RESOURCES IN CALIFORNIA

The decision below has the potential to create chaos among water users in California. Contrary to the position taken by the California Supreme Court, the United States, as both sovereign and the owner of approximately 48% of all land in California, simply cannot be considered to be "just like any other landowner" when determining its water rights. Virtually all of the land owned by the United States in California is riparian; much of that land is located in the state's mountains, in which most of California's rivers and streams originate. As a result, the federal government's riparian claims could extend to almost all waters flowing in rivers and streams in California. It is therefore clear that any significant exercise of riparian rights by

the federal government would impact the entire state by radically reducing California's already critically short water supplies.

Even if the federal government does not exercise its riparian rights to the fullest extent possible, the mere existence of such rights injects enormous uncertainty and instability into California's water rights system. In California, riparian rights are superior to all other water rights, including those on which almost all water users in California rely. Riparian rights may generally be exercised at will, without notice or review by any other party,[4] for *any* beneficial use on riparian lands. Consequently, even the existence of substantial

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[4] Under existing California law, in the context of a statutory water rights adjudication "unexercised" riparian rights may be determined to be of lower priority than appropriative rights and may be exercised only after quantification by the California State Water Resources Control Board. *In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339 (1979). In its decision below, the California Supreme Court relied on the State's power to so prioritize and quantify "unexercised" riparian rights to mitigate the potentially drastic effects of its recognition of riparian rights held by the federal government. Unless the court below intended to expand the authority of the California State Water Resources Control Board, such reliance requires that all of the federal government's riparian rights be both deemed "unexercised" and subjected to a statutory adjudication. Unfortunately, it is not at all clear when riparian rights in California are deemed to be exercised (and therefore paramount to all other water rights). Further, while the instant case arises as the result of a statutory adjudication, it is foreseeable that the federal government will make substan-

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riparian rights which could be exercised at the whim of the United States for a limitless variety of uses prohibits effective planning and management of water resources. The decision below therefore makes it impossible for any California water user to rely upon water supplies which, even prior to that decision, were at best unpredictable. The creation of new uses for water on federal lands, changes in the White House, or even revisions of policies within an administration, could result in substantial differences in the exercise of riparian rights vested in the federal government. The California Supreme Court has thus left the state's water users to guess as to when the vast riparian rights held by the federal government might be exercised and to what extent.

The decision below also creates substantial uncertainty as to *who* may exercise the federal government's riparian rights. For example, it is possible that holders of special use permits issued by the Bureau of Land Management for federal lands and holders of licenses granted by the Federal Energy Regulatory Commission might be allowed to exercise those rights. The decision below also leaves open the issue of whether federal riparian rights may be exercised in connection with

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tial claims under its riparian rights outside of statutory adjudications. The reliance by the California Supreme Court on the California State Water Resources Control Board to prioritize and quantify the federal government's riparian rights in a manner designed to foster reasonable and beneficial use of the state's scarce water resources is therefore misplaced.

Indian homelands, military reservations, ranger stations and numerous other federally-controlled facilities. Again, the California Supreme Court has seen fit to require California's water users to predict the future in order to manage one of the state's scarcest resources.

While the decision below will have profound effects on all water users in California, perhaps the most drastic impact will be felt by California's already trouble-plagued farmers. California's multi-billion dollar agricultural industry is by far the largest user of water in California, most of which would be subject to the exercise of riparian rights held by the federal government. Especially in the existing climate of economic uncertainty for farmers, a reduction in available water supplies, or even the possibility of such a reduction, will almost certainly result in the reevaluation by growers as to whether they wish to remain in the farming business. In addition, farmers would be required to develop alternative water supplies; unfortunately, for most California farmers the only alternative would be the costly pumping of groundwater from California's already critically overdrafted groundwater basins. It is predictable that many growers will elect to withdraw their lands from production rather than face the uncertainty and additional expense which accompanies unpredictable and/or fluctuating water supplies. The social, economic and environmental impacts of the decision below are therefore potentially enormous, both for California and for the nation.

CONCLUSION

The present case represents a serious and unjustified misapplication of the law which may prove devastating for all water users in California. It results in the disruption of California's long-standing system of determining water rights and allocating the State's scarce water resources in a manner which will result in the maximum beneficial use of those resources. Particularly hard hit will be California's farmers, such as those which are provided water by the Authority and its members.

Because of the potentially dramatic impact of the decision below on California's water users, as well as for the reasons presented by the State in its petition for a writ of certiorari, amicus respectfully requests that the Court grant certiorari in order to review and correct the decision below.

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Respectfully submitted,

A. B. EWELL, JR.*
GARY W. SAWYERS
*COUNSEL OF RECORD
A. B. Ewell, Jr., A
Professional Corporation
83 East Shaw Avenue
Suite 203
Fresno, California 93710
Telephone: (209) 225-8300
Attorneys for Amicus Curiae,
Friant Water Users Authority